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IN THE
COURT OF APPEALS OF INDIANA

ELLIOT D. CARTER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A05-0803-CR-153
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0710-FA-73

August 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Elliot Carter appeals his sentence following his convictions for Attempted Murder, a Class A felony, Carrying a Handgun without a License, a Class C felony, and Criminal Recklessness, as a Class D felony. He presents two issues for our review:

1. Whether the trial court abused its discretion when it sentenced him.

2. Whether his sentence is inappropriate in light of the nature of the offenses and his character.

We affirm.[1]

FACTS AND PROCEDURAL HISTORY

On October 1, 2007, Whitney Davis, Charles Taylor, Arlita Jackson, and Carter were drinking alcohol and playing cards together in Jackson's apartment. Also present was Jackson's four-month-old son. At one point, Carter bragged that he could "beat up everybody in the house." Transcript at 105. Jackson and Carter then began arguing, and Carter drew a handgun from his pants pocket and pointed it at Jackson's head. Davis and Taylor talked Carter into putting the gun away, and Jackson went outside with Taylor.

When Jackson reentered the apartment, she approached her infant son, and Carter resumed arguing with her. After Jackson picked up her son, Carter yelled at Jackson and shot her four times at close range. Jackson dropped her son after she sustained the first shot, and her son did not sustain any bullet wounds. Jackson was immediately hospitalized and survived her life-threatening injuries.

[1] Carter has included a copy of the entire transcript in his appendix on appeal in violation of Indiana Appellate Rule 50(B)(1)(b) and (d). We remind Carter's counsel to abide by these important appellate rules in the future. Only relevant portions of the transcript should be reproduced in the appendix.

The State charged Carter with attempted murder, carrying a handgun without a license, and criminal recklessness. A jury found him guilty as charged, and the trial court entered judgment accordingly. At sentencing, the trial court did not find any mitigators and found aggravating Carter's "juvenile and adult criminal history" and "failed efforts at rehabilitation." Sentencing Transcript at 12. The trial court sentenced Carter to an aggregate sentence of sixty years. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Abuse of Discretion

Carter first contends that the trial court abused its discretion in sentencing him. Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of that discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on other grounds on reh'g, 875 N.E.2d 218 (Ind. 2007). "An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." Id. (quotation omitted).

> One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. Under those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.

Id. at 490-91. Further, "the trial court no longer has any obligation to 'weigh' aggravating and mitigating factors against each other when imposing a sentence." Id. at 491.

Carter maintains that the trial court abused its discretion when it did not identify any mitigators. Specifically, Carter asserts that the trial court should have identified his young age and the hardship his incarceration would have on his infant daughter as mitigators. But, as the State points out, Carter's counsel told the trial court that he could not, "in good faith[,] argue any mitigators." Sentencing Transcript at 5. And while Carter, during his statement to the trial court, mentioned the fact that he has an infant daughter, he did not put that fact into the context of a proffered mitigator. It is well settled that a defendant who fails to raise proposed mitigators to the trial court is precluded from advancing them for the first time on appeal. Pennington v. State, 821 N.E.2d 899, 905 (Ind. Ct. App. 2005). The issue is waived.

Still, Carter asserts that the trial court should consider his proffered mitigators because the court was "inherently aware" of them. Brief of Appellant at 15 (citing Francis v. State, 817 N.E.2d 235, 237 n.2 (Ind. 2004)). Even assuming Carter is correct, the trial court was free to disregard mitigating factors it did not find to be significant. See Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999). And Carter carries the burden on appeal to show that a disregarded mitigator is significant. See id. Carter has not met that burden here. The court did not abuse its discretion in sentencing Carter.

Issue Two: Appellate Rule 7(B)

Carter also argues that his sentence is inappropriate in light of the nature of the offenses and his character. Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution "authorize[] independent appellate review and revision of a sentence imposed by the trial court." Roush v. State, 875 N.E.2d 801, 812 (Ind. Ct. App. 2007) (alteration original). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. Revision of a sentence under Appellate Rule 7(B) requires the appellant to demonstrate that his sentence is inappropriate in light of the nature of his offenses and his character. See Ind. Appellate Rule 7(B); Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). However, "a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." Roush, 875 N.E.2d at 812 (alteration in original).

Carter's sixty year aggregate sentence is not inappropriate in light of the nature of the offenses. In the course of a card game, Carter responded to a verbal argument by pointing a handgun at Jackson's head. Then, even after the heat of that moment had passed and Jackson had left the apartment and returned, Carter shot Jackson four times at close range, also endangering the life of Jackson's infant son. Carter acknowledges that,

"[b]y grace alone, the victims . . . are alive today." Brief of Appellant at 18. We cannot say that Carter's sentence is inappropriate in light of the nature of the offenses.

Likewise, Carter has not demonstrated that his character warrants revision of his sentence. His criminal history is significant.[2] As the trial court stated at sentencing, Carter "accumulated seven juvenile adjudications as a delinquent, [and] five misdemeanor convictions and one prior felony" as an adult. Sentencing Transcript at 15. And Carter violated the terms of his probation both as a juvenile and as an adult. Indeed, on appeal, Carter is hard-pressed to argue that his character warrants a reduced sentence.

Still, Carter argues that he is not the worst offender and his offenses are not among the worst offenses. Thus, he contends that his convictions do not warrant the maximum sentence. In Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), trans. denied, we explained:

> There is a danger in applying this principle that is illustrated in the instant case. If we were to take this language literally, we would reserve the maximum punishment for only the single most heinous offense. In order to determine whether an offense fits that description, we would be required to compare the facts of the case before us with either those of other cases that have been previously decided, or–more problematically–with hypothetical facts calculated to provide a "worst-case scenario" template against which the instant facts can be measured. If the latter were done, one could always envision a way in which the instant facts could be worse. In such case, the worst manifestation of any offense would be hypothetical, not real, and the maximum sentence would never be justified.
>
> This leads us to conclude the following with respect to deciding whether a case is among the very worst offenses and a defendant among the very worst offenders, thus justifying the maximum sentence: We should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity

[2] Carter has not included a copy of his presentence investigation report in his appendix on appeal. Because he does not challenge the trial court's recital of the details of his criminal history at sentencing, we rely on that portion of the transcript in our review.

> of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character.

Here, Carter responded to a verbal argument by pointing a handgun at Jackson's head. After that confrontation ended without a shooting, Carter later pulled his gun out again, this time shooting Jackson four times at close range. Jackson was holding her four-month-old son at the time. Both victims could have been killed, but Jackson survived her injuries, and her infant son was not hurt. Further, Carter's criminal history reveals that he has not responded to several previous efforts at rehabilitation. We cannot say that Carter's sixty-year sentence is inappropriate in light of the nature of the offenses and his character.

Affirmed.

MAY, J., and ROBB, J., concur.